No. 99-

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE
UNITED STATES

JEROME SMITH,

Petitioner,

VS.

BOARD OF TRUSTEES FOR THE OKOLONA MUNICIPAL SEPARATE SCHOOL DISTRICT; W. HOWARD GUNN, EDDIE BRASFIELD, GEORGE MAYFIELD, WILLIAM RANDLE, and LYNN FAIR, In Their Capacity as Board Members; and GERALD HEGAN, Individually and in his Capacity as Superintendent

Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Policy and Procedure Manual, as well as Rules and Regulations, adopted by a public school district alter at-will employment and create property rights which must be respected?

PARTIES

All of the parties are listed on the caption.

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No. 99-

IN THE
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OCTOBER TERM, 1999

JEROME SMITH,

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V.

BOARD OF TRUSTEES FOR THE OKOLONA MUNIPICAL SEPARATE SCHOOL DISTRICT, ET AL

Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Jerome Smith respectfully prays that this Court issue a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered on July 26,1999.

OPINIONS BELOW

The opinion of the Fifth Circuit is set out at pp. 1a-2a of the Appendix hereto. The opinion of the district court granting the respondent's motion for summary judgment is set out at pp. 4a-13a of the Appendix.

JURISDICTION

The decision of the Fifth Circuit was entered on July 26, 1999. The jurisdiction of this court is invoked pursuant to 28 U.S.C. §1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves an employee's right to work under 42 U.S.C. 1983. It also involves "Common Law" as it relates to a public employer's right to terminate in violation of its own Policy and Procedure Manual as well as Rules and Regulations adopted by the public school district. Employee rights are also invoked under the Due Process Clause and Equal Protection Clause of the Constitution of the United States.

STATEMENT OF THE CASE

Petitioner Jerome Smith served as principal of the Okolona High School for the school years of 1994-95, 1995-96, and 1996-97. He was the first black to serve as High School Principal since the schools in the Okolona Municipal Separate School District were desegregated in 1970. Petitioner served in the Okolona Municipal Separate School District for twenty-six (26) years. He has served as teacher, coach, assistant principal, and principal. Petitioner holds a Masters Degree as well as a Ph.D. from the University of Mississippi. He holds a number of certifications from the State of Mississippi, including AAAA in Biology and Science and AA in School Administration. Petitioner was terminated in June, 1997, by his new less qualified superintendent, Gerald Hegan, who only holds a Master's Degree and AA Certification. Mr. Hegan was employed in August, 1996, and within a few months he notified petitioner, as well as all other administrators, that he would be terminated for poor job performance. (App.5a)

At the time the superintendent was appointed, and at all times relevant hereto, the respondent school district was operating under Rules and Regulations which obligated the superintendent to follow certain guidelines prior to termination. Specifically, the superintendent was required to follow Personnel Appraisal Procedure. (App.6a)

There were racial implications in the firing of petitioner. The new superintendent's appointment was racially controversial. The school board appointed Mr. Hegan against the recommendation of the outgoing superintendent, who was white, and over the objections of the black board members. The other candidate was black. (App. 5a)

Although petitioner was not directly involved in the racial controversy involving the school board, he was adversely affected because the new superintendent, within months of his appointment, issued termination notices to all the administrators that were employed by his predecessor. (App.8a)

Because of the racial implications aforestated, and because of his due process rights and property rights under 42 U.S.C. Section 1983 and the U.S. Constitution, petitioner filed his Complaint in the U.S. District Court for the Northern District of Mississippi. In addition, petitioner asserted his rights under state law pursuant to pendent jurisdiction.

On May 11, 1998, the respondent filed a motion for summary judgment claiming that petitioner's rights were not violated under Title VII. As for petitioner's common law rights, respondent simply responds that a violation of one's policies, practices or procedures does not bestow upon an employee a private cause of action entitling plaintiff to remedial relief.

On October 30th 1998, the District Court granted Summary Judgment against petitioner on all grounds. (App.3a)

On November 13, 1998, petitioner filed his Notice of Appeal to the Fifth Circuit Court of Appeals. On July 26, 1999, the Fifth Circuit Summarily affirmed the decision of the District Court. (App.1a)

REASONS FOR GRANTING THE WRIT

Petitioner is abandoning in this court his claim of racial discrimination, because this claim does not raise any issues for which this court would likely grant a writ; however, the petition for writ of certiorari should be granted to hear petitioner's claim that the respondents violated due process and his property rights.

The decision of the Fifth Circuit conflicts with rulings from several other circuits, and this case should be heard to resolve the conflicts between the circuits on the effect that policy manuals, handbooks, rules and regulations adopted by a public school district can have on at-will employment.

The decision of the Fifth Circuit also conflicts with other decisions it has rendered relative to employment at-will.

Finally, the Fifth Circuit totally disregarded petitioner's property rights under 42 U.S.C. Section 1983.

I. The Decision Below Is Conflict With Decisions In Numerous Other Circuits

This case concerns the Fifth Circuit's interpretation and application of the "employment at will" doctrine. The Fifth Circuit refused to address the issues raised by petitioner except to say that "we affirm for the reasons given by the District Court." The district court's opinion similarly falls short of addressing the issues, as the following quote demonstrates:

> Finally, the plaintiff contends that the defendants violated the established policies, practices and procedures of the school district in one or more ways, including not following the exact letter of the school district's personnel appraisal process. The court finds that the plaintiff has failed to cite any authority for such a cause of action against the school district, and therefore the plaintiff's claims for various violations of school policies should be dismissed.

The district court simply ignored or refused to acknowledge *Bobbitt v. Orchard, LTD,* 603 So. 2d 356 (Miss.1992) which was cited by petitioner. In pertinent part the Mississippi Supreme Court in *Bobbitt* states the following:

> ...The question in this case is when an employer furnishes its employees a detailed manual stating its rules of employment, and setting forth procedures

> that will be followed in event of infraction of its rules of employment, can it completely ignore the manual in discharging an employee for the infraction clearly covered by the manual? Put otherwise, when an offense specifically covered by the employer's own manual provides no more severe disciplining than a warning or counseling of the employee, may the employer pay no attention to the manual and fire the employee instead?...
>
> .....
>
> ... [W]e hold the employer to its word...

Even though the *Bobbitt* case, supra, makes it clear that an employer cannot chose to ignore its own policy manuals and rules and regulations, the Fifth Circuit Court of Appeals disregarded Mississippi case law.

In *Gorrill v. Iceland/Flugleidir*, 761 F.2d 847 (2nd Cir. 1985), the 2nd Circuit stated that company's operations manual constituted a binding contract.

In *Lawrence v. National Westminister Bank*, 98 F.3d 61(3rd Cir. 1996), the 3rd Circuit stated that a company's employment manual may contractually bind the company.

In *Mix v. University of New Orleans*, 609 So. 2d 958 (4th Cir. 1992) the 4th Circuit suggests that if the employee did not negotiate or bargain for terms of the grievance procedure, it does not create any rights.

In *Gagne v. Northwestern Nat. Ins.Co.*, 881 F.2d 309 (6th Cir. 1989), the 6th Circuit stated that an employee handbook did not create an implied contract under state law that could be breached.

The 7th Circuit takes the position that an employee handbook may alter at will employment if it contains express conditions from which it reasonably could be inferred that the employee had certain substantive or procedural rights. *Fittshur v. Village of Menomonee Falls*, 31 F.3d 401

In *Bethea v. Levi Strauss & Co.*, 827 F.2d 355 (8th Cir. 1987), the 8th Circuit ruled that although an employer failed to follow its lay off guidelines in its internal personnel manual, of lay off criteria did not change employee's at-will status and create claim for breach of contract.

In the 8th Circuit an employee's at-will status can be altered by "policy statement". *Qualls v. Hickory Springs Mfg. Co.*, 994 2d 505 (8th Cir.1993).

In *McIlravy v. Kerr-McGee Corp*, 74 F.3d, 1017 (10th Cir. 1996) the 10th Circuit found that genuine issue of material of fact precluding summary judgment existed in whether employer's 1976 and 1977 handbooks promised not to discharge employee absent "cause" for dismissal, where company representatives referred to handbooks as "employee bibles."

In *Jackson v. Integra, Inc.* 952 F.2d 1260 (10th Cir. 1991) the 10th Circuit stated that an employee manual can create implied contract if circumstances warrant.

II. The Decision Below Is In Conflict with Other Decisions of The Fifth Circuit

In *Smith v. Kerrville Bus Co.*, 709 F.2d 914 (5th Cir. 1983), the 5th Circuit decided that an employer should not have been granted summary judgment against the employee under at-will contract where driver claimed he was wrongfully terminated in violation of a drivers rulebook.

In *Wallace v. Shreve Memorial Library*, 79 F.3d 427 (5th Cir. 1996), the 5th Circuit stated that an employment manual is merely a unilateral statements by a public employer of what actions it considered unacceptable and did not meet the requirements of employment contracts as would modify employee's at will status and create a property interest in employment.

III. The Fifth Circuit Totally Disregarded Petitioner's Property Rights Protected By 42 U.S.C., Section 1983

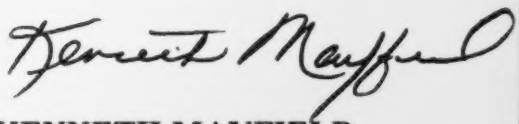
In *Whitfield v. Finn*, 731 F.2d 1506 (11th Cir. 1984), the 11th Circuit held that a "published rule" can alter at will employment. In *Whitfield* a policeman was claiming he was denied due

process of law under 42 U.S.C. 1983 for deprivation of his job without due process of law. The 11th Circuit Court of Appeals held that the policeman was vested with a property right for purposes of the federal suit.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted and the decision of the court below reversed.

Respectfully submitted,



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APPENDIX

NO. 98-60736
UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

JEROME SMITH
Plaintiff – Appellant,

v.

Board of Trustees of the Okolona Municipal Separate School District, et al.
Defendant – Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF MISSISSIPPI(1:97CV226-B-D)

Before **WIENER, BARKSDALE,** and **STEWART,** Circuit Judges.

Per Curiam: *

Dr. Jerome Smith appeals the summary judgment dismissing his claims against the Board of Trustees and Superintendent of the Okolona Municipal Separate School District, arising out of the non-renewal of his contract as Principal of Okolona High School.

Although Smith failed to file any response to the summary judgment motion, he contends now that the failure to renew his contract violated his Fourteenth Amendment rights to be free from racial discrimination and his First Amendment

rights to speech and assembly; that the Appellees violated his employment contract rights by failing to give him a "corrective action plan"; and that they violated his rights under MISS. CODE ANN. § 37-9-111, by failing to timely notify him of the Board's decision.

Pursuant to our review of the summary judgment record, we conclude that the district court correctly determined that there is no material fact issue. FED. R. CIV. P. 56 (C). Accordingly, essentially for the reasons stated by the district court, ***Smith v. Board of Trustees,*** No. 1:97-CV-226-B-D (N.D. Miss. Oct. 30, 1998), the judgment is

AFFIRMED

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[1] Pursuant to 5TH Cir. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH Cir. R. 47.5.4.

NO. 1:97-CV-226-B-D
IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF MISSISSIPPI EASTERN DIVISION

DR. JEROME SMITH,
Plaintiff

v.

BOARD OF TRUSTEES OF THE OKOLONA MUNICIPAL SEPARATE SCHOOL DISTRICT,
ET AL.
Defendant.

ORDER

In accordance with the memorandum opinion this day issued, it is **ORDERED:**
that the defendants' motion for summary judgment is **GRANTED;** and that this cause is **DIMISSED with prejudice.**

THIS, the 30 day of October, 1998.

/s/_____
NEAL B. BIGGERS, JR.
CHIEF JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF MISSISSIPPI EASTERN DIVISION

DR. JEROME SMITH
Plaintiff

v. **226-B-D**

BOARD OF TRUSTEES OF THE OKOLONA MUNICIPAL SEPARATE SCHOOL DISTRICT; W. HOWARD GUNN, EDDIE BRASFIELD, GEORGE MAYFIELD, WILLIAM RANDLE, and LYNN FAIR, In Their Capacity as Board Members; and GERALD HEGAN, Individually and in his Capacity as Superintendent
Defendants

MEMORANDUM OPINION

This cause comes before the court upon the defendants' motion for summary judgment. Upon due consideration of the parties' memoranda and exhibits, the court is ready to rule.

FACTS

The plaintiff, a black male, served as principal of Okolona High School from 1994-1997 (three school years). He has a Ph.D. and had worked for the Okolona School District for 26

years by the expiration of the 1996-1997 school year. The plaintiff has AAAA certification from the State of Mississippi in Biology and Science and AA certification in Administration.

The defendant Gerald Hegan, a white male, holds a master's degree and AA certification, presumably in Administration. He was appointed superintendent of the Okolona School District in August of 1996 by a three-two vote of the school board. The board's vote was split along racial lines. The outgoing superintendent had recommended Larry Dantzler for the job of superintendent. Dantzler, a black male, was the assistant superintendent at the time. According to the plaintiff, Dantzler had more experience and was more qualified for the job than Hegan. The plaintiff asserts that he openly and publicly opposed Hegan by attending meetings in support of Dantzler.

After a less than satisfactory evaluation of the plaintiff on February 5, 1997, defendant Hegan informed the plaintiff of February 17, 1997, that his contract of employment would not be renewed. Pursuant to the School Employment Procedures Act ("SEPA"), the plaintiff requested a list of reasons for his non-renewal and a hearing. The hearing was held on May 2, 13 and 20, 1997, before a local attorney, Michael Malski. The plaintiff was allowed to put on evidence and cross-examine the district's witnesses. Malski submitted a Report and Recommendation to the school board, dated May 30, 1997, recommending that the non-renewal be upheld. After oral

argument before the school board on June 23, 1997, the board voted to accept the Report and Recommendation. The plaintiff subsequently filed suit for racial discrimination, violation of his First Amendment right to free speech, violation of due process, violation of the School Employment Procedures Act, violation of the defendant's personnel appraisal process, and violation of established policies, practices, and procedures of the school district.

LAW

On a motion for summary judgment, the movant has the initial burden of showing the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 325, 91 L.Ed. 2d 265, 275 (1986) ("the burden on the moving party may be discharged by 'showing'...that there is an absence of evidence to support the non-moving party's case"). Under Rule 56 (e) of the Federal Rules of Civil Procedure, the burden shifts to the non-movant to "go beyond the pleadings and by...affidavits, or by the 'deposition, answers to interrogatories, and admission on file,' designate "specific facts showing that there is a genuine issue for trial." Celotex Corp., 477 U.S. at 324, 91 L.Ed at 274. That burden is not discharged by "mere allegations or denials." Fed. R. Civ.P. 56 (e). All legitimate factual inferences must be made in favor of the non-movant. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 91 L. Ed.2d 202, 216 (1986). Rule 56 (c) mandates the entry of

summary judgment "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp., 477 U.S. at 322, 91 L.Ed. 2d at 273. Before finding that no genuine issue for trial exists, the court must first be satisfied that no reasonable trier of fact could find for the non-movant. Matsushita Elec. Indus. V. Zenith Radio Corp., 475 U.S. 547, 587, 89 L.Ed.2d 538, 552 (1986).

To present a prima facie case of racial discrimination under Title VII, the plaintiff must show: (1) that he was a member of a protected class; (2) that he was qualified for the position held; (3) that he was subject to an adverse employment decision; and (4) that he was replaced by someone outside of the subject classification. Meineck v. H & R Block, 66 F.3d 77, 83 (5th Cir. 1995); Marks v. Prattco, Inc., 607 F.2d 1153m 1155 (5th Cir. 1979). A plaintiff may always present a prima facie case by offering direct evidence of discrimination, in which case the four-part test developed for circumstantial evidence is unnecessary. Lee v. Russell County Bd. of Educ., 684 F.2d 769, 774 (5th Cir. 1982). Once the plaintiff presents a prima facie case, the defendant must articulate a legitimate, non-discriminatory reason for the employment action. McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 802-805, 36 L.Ed. 2d 668, 677-697 (1973). If the defendant is able to do so, the burden of production shifts back to the plaintiff to produce

evidence that the defendant's articulated reason is merely a pretext for discrimination. Id.

The plaintiff makes three arguments in his attempt to establish racial discrimination. First, the plaintiff asserts that Hegan's appointment to the position of superintendent was tainted with racial discrimination. However, the plaintiff was not a candidate for the position of superintendent. Any racial bias in the selection of Hegan has no application to the plaintiff's claim of racial discrimination in the non-renewal of his contract as principal of Okolona High School. Second, the plaintiff asserts that the "cleaning house"[1] approach of Hegan had a disparate impact on black administrators. However, the court finds that the disparate impact analysis is inappropriate in this type of case involving alleged individual discrimination. The disparate impact analysis would be more appropriate in a situation where the school district's racially neutral employment requirements has a disparate impact on the number of blacks who were qualified for positions.

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[1] Apparently, all of the top administrators in the Okolona School District were let go after the 1997 school year, including the principals at Okolona High School and Okolona Elementary School and the director of the Okolona Vo-Tech Complex.

Finally, the plaintiff asserts that an incident involving a post card sent from Hegan to the plaintiff presents direct evidence of a discriminatory bias. A few months[2] after Hegan had recommended that the plaintiff's contract not be renewed, Hegan received a post card with a picture of a smiling monkey, wearing a graduation cap, and the caption "WHAT? You've NEVER been to Harvard?" On the flip side of the card were the words "Ha. Ha. But we have."[3] The defendant Hegan believed that the card had been sent from the plaintiff and Dan Rupert, who were apparently in Boston at the time. Rupert, a white male, was the principal of Okolona Elementary School, and his contract, like that of the plaintiff, had not been renewed for the coming year. Hegan testified that he took the card as a joke, as did the office employees, who were laughing and teasing him about the card. In response, he wrote the words "I recognized you immediately! Glad you're looking so happy and rested." below the picture of the monkey. Hegan

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[2] Neither party provides an exact date for the post card incident and the postmark on the copy of the envelope sent to the plaintiff is illegible, but the defendant Hegan indicates in his deposition that the post card incident occurred in July of 1997.

[3] The court is unsure whether these words were printed by the creator of the card or written by the sender, as the flip side of the card was not submitted as an exhibit.

left the card on his desk and his secretary, of her own accord, sent a copy of the card with the added words to both plaintiff and Rupert.[4] The plaintiff contends that the words written by the defendant Hegan show discriminatory animus towards the plaintiff. However, the court finds that the post card is not sufficient to establish a prima facie case of racial discrimination. All of the evidence indicates that the words were written merely as a joke, towards both a black and white administrator, with no offense intended. A copy of the card was mailed by the secretary to both plaintiff and Rupert. Furthermore, all of this took place long after Hegan had made the decision not to renew the plaintiff's contract. According, considering all of the evidence before the court, the court finds that the incident with the post card is insufficient to allow the plaintiff to survive summary judgement on the issue of racial discrimination.

To establish a prima facie claim of a violation of the plaintiff's First Amendment rights the plaintiff must show that his conduct is

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[4]The plaintiff questions the extent of defendant Hegan's involvement in mailing the card. However, both Hegan and his secretary have stated under oath that the secretary mailed the card of her own accord and the plaintiff has provided no evidence to the contrary.

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constitutionally protected and that it was a substantial or motivating factor in the school district's decision not to renew his contract. Day v. South Park Indep. Sch. Dist., 768 F.2d 696, 700 (5th Cir. 1985), cert, denied, 474 U.S. 1101 (1986); Lindsey v. Mississippi Research and Dev. Ctr., 652 F.2d 488, 492 (5th Cir. Unit A, Aug. 1981). The plaintiff has failed to establish any evidence of a casual connection between the protected activity (supporting Dantzler for the superintendant position) and the adverse employment action (failure to renew the plaintiff's contract). When asked how Hegan would have known of the plaintiff's support for Dantzler, the plaintiff testified that he attended one or more meetings at the Okolona Auditorium in support of Dantzler. However, the plaintiff admits that Hegan was not present at any of the meetings he attended. The plaintiff acknowledged that he never made a speech or wrote an article on behalf of Dantzler and never told Hegan that the supported Dantzer for the position. The only "evidence' the plaintff has that Hegan ever knew of the plaintiff's support for Dantzler is the plaintiff's mere speculation that Hegan would have know of the plaintiff's feelings through some of the board members. The court finds that the plaintiff has not presented sufficient evidence of a casual connection between the protected activity and the adverse employment action to survive summary judgment on his First Amendment claim.

The court likewise finds that the plaintiff cannot establish a violation of due process under

the Fourteenth Amendment. SEPA provides limited due process rights to certified public school district employees, including principals. SEPA requires the school district to furnish written notice of the reasons for non-renewal of any employment contract and an opportunity for a post-non-renewal hearing before a fair and impartial board or hearing officer. Housley v North Panola Consol. Sch. Dist., 656 F.Supp. 1087, 1091 (N.D. Miss. 1987); Desoto County Sch. Bd. V. Garrett, 508 So. 2d 1091, 1093 (Miss. 1987). The evidence is undisputed that the plaintiff received both notice of the reasons for his non-renewal and a hearing before an impartial hearing officer where the plaintiff was permitted to resent evidence and witnesses in his behalf, as well as cross-examine witnesses presented by the school district. Accordingly, the court finds that the plaintiff has failed to establish any violation of his due process rights under the Fourteenth Amendment.

The plaintiff further contends that the defendants violated SEPA by not notifying him of the board's decision within 30 days of the conclusion of the hearing. Miss. Code Ann § 37-9-111(4). The plaintiff asserts that the hearing provided pursuant to the provisions of SEPA concluded on May 20 and that he was not notified of the board's final decision until June 26, over 30 days later. However, the court finds that the hearing officially concluded on May 30, 1997. The hearing officer has filed an affidavit stating that it was intention to close the hearing on May 30, as was stated in his Report and

Recommendation. Obviously, any decision issued on June 23 would be within 30 days of May 30. Furthermore, the decision to hold oral argument before the board on June 23 was made after consulting with plaintiff's counsel, who agreed to the date without raising an objection as to the 30-day requirement. Plaintiff was represented by counsel at the hearing before the board and no objection was made at the time as to the running of the 30-day period. The court finds that the plaintiff's failure to raise the 30-day issue when scheduling the oral argument or during the oral argument precludes the plaintiff from asserting a violation of the statute now. Finally, even if the defendants have committed a technical violation of the statute, so long as there was a substantial and manifestly good faith attempt by the board to comply with the Act and the employee was represented by counsel, procedural defects will not render the board's actions unlawful. See Cox v. Thomas, 403 So.2d 135, 137-138 (Miss. 1981). For that reason as well, the court finds that there has been no violation of the statute.

Finally, the plaintiff contends that he defendants violated the established policies, practices, and procedures of the school district in one or more ways, including not following the exact letter of the school district's personnel appraisal process. The court finds that the plaintiff has failed to cite any authority for such a cause of action against the school district, and therefore the plaintiff's claims for violation of various school policies should be dismissed.

CONCLUSION

For the foregoing reason, the court finds that the defendant's motion for summary judgment should be granted. An order will issue accordingly.

THIS, the 30 day of October, 1998.

/s/_____

NEAL BIGGERS, JR.
CHIEF JUDGE

Supreme Court, U. S.
FILED
NOV 29 1999
CLERK

No. 99-713

IN THE

Supreme Court of the United States

JEROME SMITH,

Petitioner,

v.

BOARD OF TRUSTEES OF THE OKOLONA MUNICIPAL SEPARATE SCHOOL DISTRICT, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING

The following listed persons are parties to the proceeding.

1. Jerome Smith, Petitioner

2. Board of Trustees of the Okolona Municipal Separate School District, W. Howard Gunn, Eddie Brasfield, George Mayfield, William Randle and Lynn Fair, Respondents

3. Gerald Hegan, Respondent

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following two provisions are involved in the instant case:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without the due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. Am XIV, sec. 1.

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the

> purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statue of the District of Columbia.

42 U.S.C. § 1983.

MISSTATEMENTS OF FACT IN PETITION FOR WRIT OF CERTIORARI

Petitioner's brief contains several misstatements which must be brought to the Court's attention pursuant to Supreme Court Rule 15.2. First, Petitioner claims on pages 3-4 of his Petition that he was terminated from his position at the Respondent School District in June, 1997 by Respondent Hegan. That is not true. Petitioner had a one-year contract with the Respondent School District which was not renewed by the School District for the 1997-1998 school year. (App. 5a). The non-renewal and termination of contracts of school administrators is governed by the School Employment Procedures Act ("SEPA"), Miss. Code Ann. § 37-9-101 *et seq.* Terminations are treated differently than non-renewals. Termination of an administrator's contract requires "cause," but a non-renewal does not. Miss. Code Ann. §§ 37-9-59 and 37-9-109 (1996, as amended).

Secondly, Petitioner states that the School District was obligated to follow a personnel appraisal procedure when non-renewing his contract and cites page 6a of the Appendix as support for that assertion. Page 13a of the Appendix is a portion of the District Court's opinion setting forth Petitioner's argument in the court below. That opinion does not say that the School District was required or obligated to follow the personnel appraisal procedure.

Third, there has never been a finding that Petitioner's non-renewal was racially motivated as implied by Petitioner on page 4 of the Petition. To the contrary, the district court and the Fifth Circuit both ruled against Petitioner on his claims of racial discrimination. (App. 10a).

STATEMENT OF THE CASE

On July 14, 1997, Petitioner, Jerome Smith filed a Complaint against the Okolona Municipal Separate School District ("School Board"), and its Superintendent charging that the School Board's decision not to renew his one-year contract as a Principal for the 1997-1998 school year was in violation of the Fourteenth Amendment to the United States Constitution. Specifically, Petitioner now claims that he had a property interest in a future contract with the Respondent School District because he claims that the School District did not follow the personnel appraisal system which he contends was adopted by the Respondent School District as its internal policies, practices and procedures.

The issue is whether Petitioner had a property interest in a future contract for the 1997 - 1998 school year sufficient to invoke his claim of a procedural due process violation. Mississippi follows the employment-at-will doctrine, but also has a statutory scheme, SEPA, which details procedures a School District should follow in non-renewing an administrator's contract. Petitioner does not allege a violation of SEPA. Petitioner does not allege that he had entered into a contract with the Respondent School District for the 1997-1998 school year. Instead, he claims a property interest in future employment sufficient to support a claim under 42 U.S.C. § 1983 for a denial of due process because the Respondent School District allegedly did not follow a written system for evaluating employees.

On October 30, 1998, the District Court properly entered an Order granting Summary Judgment to the Respondents on all grounds (App. 4a). On July 26, 1999, the Fifth Circuit filed its opinion affirming the district court's decision. (App. 1a).

The Petition for Writ of Certiorari was docketed on October 26, 1999. Petitioner seeks to appeal what he claims is the Fifth Circuit's decision on Petitioner's claims of denial of due process under the Fourteenth Amendment.

A. Petitioner has no property interest in a future contract of employment with the Respondent School District.

Petitioner claims a violation of his procedural due process rights. The constitutional right to procedural due process arises only when a risk of deprivation of life, liberty or property is implicated. *Bishop v. Wood*, 426 U.S. 341, 96 S. Ct. 2074, 48 L. Ed. 2d 684 (1976). A person has a property interest in a given job only if he or she can establish a legitimate entitlement to or an expectation of continued employment. *Perry v. Sindermann*, 408 U.S. 593, 601, 92 S. Ct. 2694, 2699, 33 L. Ed. 2d 570 (1972). Whether such an entitlement or expectancy exists must be determined by reference to state law. *Bishop*, *supra*, at 344, 96 S. Ct at 2077, 48 L. Ed. 2d at 689.

Petitioner claims that he had a property interest in a future employment contract with the School District because the School District did not follow the personnel appraisal system before deciding not to renew his contract for another year. That assertion does not confer property rights upon Petitioner under Mississippi law. Mississippi follows the

traditional employment-at-will doctrine. *See, e.g., Adams v. Institute of Community Services, Inc.*, 727 So.2d 739 (Miss. Ct. App. 1998) (*cert. denied*, April 8, 1999); *Kelly v. Mississippi Valley Gas Co.*, 397 So.2d 874, 874-875 (Miss. 1981). That means an employee in Mississippi can be terminated by his employer without any cause. *Id.*

As Petitioner indicates, the Mississippi Supreme Court's decision in *Bobbitt v. Orchard, Ltd.*, 603 So.2d 356 (Miss. 1992), carved out an exception to the employment-at-will doctrine where an employer furnishes its employees a detailed manual explaining the rules of employment and setting forth procedures to be followed for disciplinary action. That case has some very defined parameters. There, the court hinged its holding on the facts that the employer used and disseminated the employee handbook; the employee signed an application agreeing to abide by all the rules of The Orchard, and the employer made sure that it gave the employee handbook to all employees. *Id.* at 361. The court also relied on the fact that there was no disclaimer in the handbook telling the employee that the employee handbook did not affect the employer's right to terminate the employee at will. *Id.* at 362. Even in that precisely defined situation, the court noted that an employee handbook "did not give the employees 'tenure,' or create a right to employment for any definite length of time, but it did create an obligation on the part of The Orchard to follow its provisions in remanding, suspending or discharging an employee for infractions specifically covered therein." *Id.* at 362.

That exception to the employment-at-will doctrine does not extend to Petitioner's situation where there is no allegation that the Respondent School District used the personnel appraisal system or disseminated the personnel

appraisal system or that Petitioner relied on the personnel appraisal system. Petitioner had a right to a hearing under SEPA of which he availed himself. (App. 5a). Once the School District had allowed Petitioner to be heard at the non-renewal hearing and there was a finding that the non-renewal was not done in violation of Petitioner's constitutional rights, Petitioner only had the rights of any employee-at-will in Mississippi. *Jones v. Birdsong*, 530 F. Supp. 221 (N.D. Miss. 1980), *aff'd*, 679 F.2d 24 (5th Cir. 1982), *cert. denied*, 459 U.S. 1202 (1983). SEPA does not create a duty of the School District to demonstrate good cause for non-renewals. *Calhoun County Board of Education v. Hamblin*, 360 So.2d 1236, 1240 (Miss. 1978).

A careful analysis of each case cited by Petitioner as support for his theory makes it evident that none of them stand for Petitioner's legal proposition that he had a property interest in a future employment contract with the Respondent School District. First, Mississippi law governs that issue. *Bishop, supra*. Second, the *Whitfield v. Finn*, 731 F.2d 1506 (11th Cir. 1984), decision of the Eleventh Circuit certainly is distinguishable from the instant case. In *Finn*, the court simply said that summary judgment was inappropriate because Plaintiff had stated enough facts to show a questionable issue of fact on whether or not Plaintiff could be terminated from his job as a police officer for any reason or whether the termination could only be "for cause." The court relied on the fact that the police department had published a regulation and made each police officer sign the regulation saying that they understood it. The regulation provided for a six month probationary employment where an officer could be terminated without cause. The court held that the remainder of the publication created a factual issue on whether or not a police officer could be terminated without cause. *Id.* at 1508-09.

The Second Circuit faced a similar issue in *Gorrill v. Icelandair/Flugleidir*, 761 F.2d 847 (2d Cir. 1985). There, the court determined that the seniority clause in an employee manual was controlling on the employer and specifically noted that the employees had received "repeated oral and written assurances from the employer that the Operations Manual contained the terms and conditions of employment and was controlling." *Id.* at 852.

The Tenth Circuit's decision in *Jackson v. Integra, Inc.*, 952 F.2d 1260 (10th Cir. 1991), simply states that an employee manual **can** create an implied contract if the circumstances warrant, but did not hold that the employee manual in question did create a contract.

Other cases cited by Petitioner in support of his argument result in a conclusion opposite the one Petitioner urges this court to reach. *See, e.g., Wallace v. Shreve Mem. Library*, 79 F.3d 427, 431 (5th Cir. 1996) (employment manual did not constitute an employment contract sufficient to create a property interest in employment for purposes of the Fourteenth Amendment to the United States Constitution); *McIlravy v. Kerr-McGee Corp.*, 74 F.3d 1017, 1022-25 (10th Cir. 1996), (employee handbook did not grant a contractual right to employees to have lay-offs determined by seniority); *Fittshur v. Village of Menomonee Falls*, 31 F.3d 1401, 1407-09 (7th Cir. 1994), (an employee handbook which contained an express disclaimer did not create a property interest in the employment sufficient to state a claim under the procedural due process of clause of the Fourteenth Amendment); *Mix v. University of New Orleans*, 609 So.2d 958 (La. Ct. App. 4th Cir. 1992) (a grievance procedure created no contractual rights in favor of an employee); *Gagne v. Northwestern Nat'l Ins. Co.*, 881 F.2d 309 (6th Cir. 1989),

(the court refused to adopt plaintiff's reasoning that the provisions in an employee handbook setting forth the reasons the employer could terminate an employee without warning did not modify the employee-at-will relationship sufficient to constitute a breach of contract claim); *Bethea v. Levi Strauss & Co.*, 827 F.2d 355, 360 (8th Cir. 1987), (an employer's failure to follow its written lay-off guidelines did not constitute a breach of contract when Missouri followed the employment-at-will doctrine).

The Fifth Circuit's decision in *Smith v. Kerrville Bus Co., Inc.*, 709 F.2d 914 (1983), is simply not applicable to the issues at hand as that case was brought under Section 3 of The Labor Management Relations Act of 1947. *Id.* at 915.

In *Qualls v. Hickory Springs Mfg. Co.*, 994 F.2d 505 (8th Cir.), *rehearing denied en banc*, 1993 U.S. App. LEXIS 17137 (1993), the court was faced with the issue of a breach of contract claim because it terminated an employee who failed a drug test. There was no constitutional claim. There, the employees had received a manual stating that a positive drug test could result in termination, but were told by their supervisors that they would not be terminated for a positive test result, but would only be terminated for refusing to submit to the test. The Eighth Circuit concluded that the plaintiff had presented enough proof to go forward on a breach of contract claim under Arkansas law because of what the employees had been told about the drug testing policy.

The situation in this case is dramatically different from the situation in *Bobbitt* and the other cases cited by Petitioner. There is no evidence that a written document was given to Petitioner which told him that the personnel appraisal system had to be followed before the Superintendent could

recommend the non-renewal of Petitioner's contract. The record is completely devoid of any proof that such information was distributed to or relied upon by Petitioner. The facts of this situation simply do not create contractual obligations for the School District and do not grant Petitioner a property interest in a future contract with the School District. Petitioner was an employee-at-will. Consequently, Plaintiff has no procedural due process rights and, therefore, no due process claim.

B. The record cannot support Petitioner's claim.

Petitioner argues that he is entitled to relief because Superintendent Hegan did not follow the personnel appraisal system which was adopted by the School Board before he recommended the non-renewal of his contract. First, there is nothing whatsoever in the record (or in Petitioner's argument) to inform the Court of what the personnel appraisal system is; what it requires; who has or has not adopted it; whether it was disseminated to Petitioner and whether it has been followed at all or followed in this situation. There is no document or testimony claiming that Petitioner ever knew that the School Board had adopted the personnel appraisal system or that Petitioner relied on any such personnel appraisal system. Assuming *arguendo* that the School Board had adopted such a system, what did it require? Did Superintendent Hegan did not follow the exact letter of the personnel appraisal system in not recommending the renewal of Petitioner's contract? Assuming *arguendo* again, did Superintendent Hegan's conduct give rise to a constitutional cause of action? We do not know because Petitioner does not tell us.

Appellant does not and cannot cite to any authority which converts the personnel appraisal system into a property interest. The personnel appraisal process is merely an internal guideline for performing evaluations of personnel - nothing more and nothing less. It is not the law — that's why it is not included in the statutory scheme of the School Employment Procedures Act, Miss Code Ann. § 37-9-101 *et seq.*, which deals extensively with the non-renewal of school administrators' employment contracts. A violation of one's policies, practices or procedures does not bestow a property right upon an employee, particularly when that employee cannot show any knowledge of or reliance on such policies, practices or procedures.

C. Petitioner should not be allowed to argue a new theory of relief on appeal.

Petitioner did not argue to the trial court or to the Fifth Circuit Court of Appeals that Petitioner's property rights under 42 U.S.C. § 1983 were violated. Petitioner's Statement of Issues presented to the Fifth Circuit is quoted in full below:

STATEMENT OF ISSUES

1. Did the District Court err in granting Summary Judgment to Defendants-Appellees on the grounds that Plaintiff-Appellant could have been a victim of racial discrimination?

2. Did the District Court err in granting a Summary Judgment to Defendants-Appellees on the issue of whether his contract rights were violated?

3. Did the District Court err in granting Summary Judgment on the issue of whether Plaintiff-Appellant rights were violated under Section 37-9-111 of the Miss. Code of 1972, as Amended?

Petitioner did not mention a procedural due process claim. Instead, he argued a breach of contract claim. He should not be allowed to change his theories of his case at this late stage of the game. This Court has consistently refused to entertain petitions alleging a new theory of relief not presented to the courts below. *See e.g., Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 147, 90 S. Ct. 1598, 26 L. Ed. 2d 142, 147, n.2 (1970); *Delta Airlines, Inc. v. August*, 450 U.S. 346, 362 101 S. Ct. 1146, 67 L. Ed. 2d 287, 298. The Court should do likewise in this situation.

REASONS FOR DENYING THE WRIT

Petitioner claims that the Writ should be granted because the Fifth Circuit's opinion conflicts with rulings from several other circuits and that the conflicts call for a resolution by this Court. That is not correct. The law on this issue has already been decided by this Honorable Court. Whether a property interest in employment exists sufficient to trigger the procedural due process clause of the Fourteenth Amendment is determined by state law. *Bishop, supra*. There is simply no conflict for the Court to resolve.

Another reason for granting the Writ, according to Petitioner, is because the Fifth Circuit's decision conflicts with other decisions the Fifth Circuit has rendered. As the above cases illustrate, that assertion, too, is inaccurate. The Fifth Circuit's decision is in conformity with its previous decisions. Petitioner does not cite the Court to one decision

where the Fifth Circuit has rendered a conflicting decision. The *Smith v. Kerrville* and *Wallace v. Shreve Memorial Library* cases, *supra*, are certainly not in conflict with the instant decision as discussed above.

The last reason given by Petitioner is his perception that the Court below disregarded his property rights under 42 U.S.C. § 1983. First, that statute grants no property rights, but merely supplies a judicial vehicle for remedying rights granted by some other law or constitutional provision. In any event, the Court below did not rule on a procedural due process claim because such a claim was not presented by Petitioner as discussed above.

None of the reasons given by Petitioner are compelling reasons for the grant of a Writ. This is not a case for the Court to use its judicial discretion to grant the Writ — the issue is not one worthy of review under Supreme Court Rule 10.

CONCLUSION

There is no viable constitutional claim as discussed above. Petitioner is asking this court to hold that the internal policies of a School Board create a property interest in employment under Mississippi whether or not Petitioner is aware of those internal policies. Such is not the current state of the law in Mississippi, nor should it be.

The district court was correct in granting summary judgment on all claims and the Fifth Circuit Court of Appeals was correct in upholding the summary judgment. The petition to this Honorable Court should be denied.

Respectfully submitted,

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